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PURSUING PROBLEM-SOLVING OR PREDICTIVE SETTLEMENT

CRAIG A. McEWEN*

HAS the initial promise of ADR to reorient the practice of law toward a higher quality, problem-solving approach been co-opted by the legal establishment, absorbed and blunted by "the adversary culture" of American law? Carrie Menkel-Meadow answers a qualified "yes," and her case for co-optation provides the central theme of her rich and provocative reflections on "Pursuing Settlement in an Adversary Culture."¹ ADR, she points out, has become highly professionalized as dispute resolution organizations have proliferated and apparently prospered. A specialized field of law with its own law reporter and law treatises has developed around ADR.² The practice of ADR itself appears to have become more rule-bound and adversarial as a body of law has developed to regulate and implement it. All of these observations are on the mark, but the resulting conclusion about ADR's co-optation requires further examination in the light of a more highly differentiated view of ADR.³

I. DIFFERENTIATING ADR

"ADR" and the "ADR movement" have, of course, been widely adopted as convenient, short-hand ways of describing a complex of interests, activities and goals, individuals and groups. The most perceptive commentators—like Menkel-Meadow—recognize vast differ-

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1. Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U.L. REV. 1 (1991).

2. In fact, as second author of a treatise on the law of mediation, I suppose that I have contributed to the legalization of ADR. See N. ROGERS & C. McEWEN, *MEDIATION: LAW POLICY PRACTICE* (1989).

3. In dwelling on the issue of co-optation, I neglect the wide range of other issues which Menkel-Meadow's rich essay addresses. For example, her Article explores insightfully the tensions between openness and privacy of dispute resolution proceedings and outcomes and presents a rethinking of the appropriateness of mandating ADR procedures. See generally Menkel-Meadow, *supra* note 1. See generally Law and Public Policy Committee of the Society of Professionals in Dispute Resolution, Report #1, *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts* (1990). The paper also poses a series of important questions for empirical research and policy debate.

ences, however, in the goals and claims of those who embrace ADR. She clearly distinguishes, for example, between those who embrace "quality" of process and outcome in their advocacy of ADR and those who embrace efficiency or quantity of settlement in their support for it.⁴ In fact, this central difference has profound implications for the relationship between dispute resolution processes and the "adversary culture." Yet that very distinction is lost when the analysis returns to unitary "ADR" (or to settlement—another concept used generically here and in much commentary elsewhere). As a result, we miss the extent of the co-optation of "ADR" on the one hand, and, on the other, evidence of its modest transformative effects on law practice.

Let us begin with a central distinction among ADR or settlement⁵ processes—one between *predictive settlement procedures* and *problem-solving settlement procedures*.⁶ In the former category are all of the devices which are organized to affect the parties' predictions of what might happen at trial and thus to encourage settlement. Non-binding arbitration,⁷ early neutral evaluation,⁸ summary jury trials,⁹

4. For a somewhat more complex, but nonetheless parallel, analysis of the makeup of the ADR movement, see Silbey & Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DEN. U.L. REV. 437 (1989).

5. Sometimes "settlement" has been used almost interchangeably with "ADR" or is employed as if it were the opposite of adversarial practice. However, settlement is a more inclusive concept than ADR. In addition, although the tensions between settlement and advocacy are readily apparent, the two are not mutually exclusive. Clearly, the adversarial culture Menkel-Meadow describes often promotes settlement in the context of advocacy. Thus, it is the aspiration for "nonadversarial" problem-solving settlement that challenges the adversarial culture, not settlement itself.

6. This distinction has emerged in discussions with Nancy Rogers and, in fact, permeates many discussions of ADR, although the labels may not be the same. See, e.g., Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. OF DISPUTE RESOLUTION 213 (1989); Keating and Shaw, "Compared to What?": *Defining Terms in Court-Related ADR Programs*, 6 NEGOTIATION J. 217 (1990); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

7. See E.A. LIND & J. SHAPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* (1981); E.A. LIND, R. MACCOUN, P. EBENER, W. FELSTINER, D. HENSLE, J. RESNIK & T. TYLER, *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* (1989) [hereinafter *PERCEPTION OF JUSTICE*]; S. CLARK, L. DONNELLY & S. GROVE, *COURT-ORDERED ARBITRATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS* (1989); Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270 (1986).

8. See, Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986).

9. See J. ALFINI, L. GRIFFITHS, R. GETCHELL & D. JORDAN, *SUMMARY JURY TRIALS IN FLORIDA: AN EMPIRICAL ASSESSMENT* (1989); Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986); Posner, *The Summary Jury Trial and*

mini-trials,¹⁰ and even, perhaps, some settlement conferences,¹¹ provide the parties a chance to try out their adversarial presentations and to have some assessment of the outcome by a "neutral" third party. These procedures do not challenge the traditional model of "litigation"¹² in which adversarial settlement negotiations occur in the context of discovery and pretrial motions and in the shadow of a likely adjudicated outcome.¹³

In problem-solving settlement, by contrast, the central goal is not to predict what a court would do. Instead, the standard for a good outcome is whether or not it meets the needs and responds to the underlying interests of the parties and, perhaps, appears generally "fair" or "just."¹⁴ These criteria for good outcomes may differ sharply from those for predictive settlement where the sole reference point is what is legally attainable—that is, an outcome that the parties might reasonably have expected to achieve at trial.

Mediation, in particular, has been advocated as a problem-solving process, and it is to mediation (along with some forms of negotiation) that Menkel-Meadow repeatedly returns to exemplify her image of what the "quality school" hopes to achieve.¹⁵ Of course, not all mediation is alike.¹⁶ The philosophies, styles, and resources of mediators and mediation programs vary substantially, with some encouraging behavior far closer to adversarial "settlement work" and others encouraging the problem-solving model that Menkel-Meadow advocates.¹⁷

Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. CHI. L. REV. 366 (1986).

10. See Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A.L. REV. 493 (1978).

11. See PERCEPTION OF JUSTICE, *supra* note 7; M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* (1964); Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

12. See Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268 (1984).

13. See Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

14. The achievement of legally attainable outcomes may or may not be one of those interests.

15. There is also extensive literature on negotiation and negotiation styles to which Menkel-Meadow has been a leading contributor. That literature will not be reviewed here except to say that among the types of negotiation style described or advocated are "problem-solving" styles. See generally Menkel-Meadow, *supra* note 6.

16. Greatbatch & Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 611, 638 (1989); McEwen & Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439 (1986); Sarat, *The "New Formalism" in Disputing and Disputing Research*, 21 LAW & SOC'Y REV. 695, 697 (1988).

17. For example, an ABA booklet on ADR distinguishes three types of mediation: rights-

The creation and availability of forums for problem-solving or for predictive settlement activity do not, of course, guarantee that parties and/or their lawyers will behave accordingly in and around them. Some lawyers may engage in problem-solving settlement negotiation after an arbitration, and some litigants may argue the merits of their legal cases in mediation. However, institutional frameworks provide important messages to individuals about expectations for behavior, and the hope of some ADR advocates has been that new forums would encourage a shift from reliance on adversarial negotiating behavior to problem-solving negotiating behavior. To understand the extent of transformation or co-optation, then, we must examine which kinds of forums the ADR movement has created and what their impact, in fact, has been on the negotiating approaches of lawyers and litigants.

II. "ADR" AND THE ADVERSARY CULTURE

This distinction among types of ADR forums requires that we refine the broad hypothesis that ADR has been co-opted by the culture of adversarialness. If we accept the proposition that the ADR forums that promote predictive settlement processes simply extend the adversarial system of litigation and negotiation, then it makes little sense to expect them to transform the adversary culture. The advocacy of settlement implicit in predictive settlement forums does not rest on a critique of adjudication or of the adversary process. These forums were not designed to challenge fundamental assumptions about how to seek legal solutions to problems, but rather to make the adversarial process more efficient and less costly to courts or to parties and perhaps also to reduce its risks by diminishing uncertainty in predictions of possible outcomes. Thus, rather than being co-opted by the adversary culture, these predictive ADR processes originate in that very culture and practice.

ADR's challenge to the "adversary culture" comes instead from problem-solving settlement forums, in essence from mediation. When it addresses nonlegal issues and explicitly encourages problem-solving negotiation, mediation challenges acceptance of the individual and so-

based mediation in which "the goal is to settle the dispute with attention to the identified legal rights of the parties"; interest-based mediation, which "is more free-wheeling with less attention given to the individual rights of each party, but with a focus on the interest or compelling issue of the dispute"; and therapeutic mediation, which "focuses more on the problem-solving skills of the parties involved. The mediator may emphasize the emotional dimensions of the dispute. Often, the parties discuss ways of handling similar conflicts in the future." *Alternative Dispute Resolution: An ADR Primer* 2 (3d ed.), Standing Committee on Dispute Resolution, American Bar Association, 1989.

cial costs of adversarial conduct and of the superiority of adjudicative solutions (predicted or actual) to disputes.¹⁸ It is these problem-solving processes then—not predictive ADR processes—that might either transform adversarial conduct or be co-opted by it. Thus, if we are to look for evidence of co-optation or effective transformation of adversarial practice, it is to the fate of mediation and to its effects, if any, on the practice of law that we should turn.

III. ADR AND PROBLEM-SOLVING SETTLEMENT

Before doing so, however, we should ask ourselves how two ideologically dissimilar—perhaps opposed—kinds of forums have come to be described as “ADR.” Further, we should ask what the consequences are of collapsing problem-solving and predictive settlement devices under the same rubric. Let us begin with the second question.

One obvious consequence of the global use of the term ADR is that people lose track of the distinctions and assume that all ADR is pretty much the same. This assumption of interchangeability in turn diminishes the possibility for problem-solving processes to challenge effectively or to transform the adversary culture. Thus, as a social movement, ADR has not itself been co-opted; it has done the co-opting. The ADR movement has effectively incorporated and, to some degree, buried within it the more challenging of its constituent elements. Problem-solving mediation has become simply another tool in the ADR tool kit.

Why then have problem-solving and predictive settlement been merged into a relatively undifferentiated ADR movement? Perhaps the major force has been the general legal policy support for settlement¹⁹ and the strong encouragement of settlement by many judges.²⁰ If settlement is the goal, distinctions among means of achieving settlement may be viewed as insignificant except as to their costs, effectiveness in producing agreements, and acceptance by litigants and their lawyers.

The rapid development and spread of predictive ADR processes in the context of this emphasis on settlement may be understood in part by examining the preference of many lawyers for predictive devices

18. Part of this critique of adjudication may be traced to Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) and Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1979). For a summary of many of the quality arguments challenging adjudication, see Sibley & Sarat, *supra* note 4, at 452-58.

19. See N. ROGERS & C. McEWEN, *supra* note 2 at 232-33. For a dissenting view about the wisdom of this policy, see Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1983).

20. See Galanter, *supra* note 11; Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1977).

and their discomfort with problem-solving approaches. These preferences are a product not just of adversarial training, but also of the character of the law and the nature of legal work and professional rewards. The law develops most where there is reliable and remunerative legal business.²¹ Where the law is most developed, so also is the business of predicting legal outcomes and maneuvering adversarially to improve the clients' chances for the best legal outcomes. Where law, legal business, and legal, adversarial skills are most developed, there will be the greatest interest in preserving and protecting definitions of disputes consistent with legal solutions. In these areas then, legal professionals will have the greatest interest, comfort and skill in developing predictive settlement devices rather than problem-solving settlement devices. Predictive techniques are the ones that feel most natural because they both grow from and reinforce the professional expertise of lawyers.²²

Despite the rise of predictive ADR and absorption of problem-solving approaches into ADR generally, the distinctions between the two have not been entirely lost. Legal policy-makers continue to direct certain classes of legal disputes wholesale to particular kinds of dispute resolution. All civil cases with dollar values under \$10,000 may be sent to nonbinding arbitration and some large civil cases end up in summary jury trials or mini-trials,²³ for example, while environmental policy disputes,²⁴ interpersonal disputes,²⁵ family law cases,²⁶ along with the smallest of money claims²⁷ and farmer-lender disputes²⁸ may be directed to mediation.

21. See, e.g., Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115 (1979); Mayhew & Reiss, *Organization of Legal Contacts*, 34 AM. SOC. REV. 309 (1969).

22. This analysis draws from the rich and varied literature on the legal profession. See generally R. ABEL, *AMERICAN LAWYERS* (1989); J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982). For a discussion of the role of bar leaders in forwarding the development of ADR, see Silbey & Sarat, *supra* note 4, at 446-50.

23. See *supra* notes 7-11 and accompanying text.

24. See, e.g., L. BACOW & M. WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION* (1984); G. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1986); S. MERNITZ, *MEDIATION OF ENVIRONMENTAL DISPUTES: A SOURCEBOOK* (1980); L. SUSSKIND & J. CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987); A. TALBOT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* (1983).

25. See, e.g., D. MCGILLIS & H. MULLEN, *NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS* (1977); Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, in *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 75 (R. Abel ed. 1982); Bethel & Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15 (1982); Shonholtz, *The Citizen's Role in Justice: Building a Primary Justice and Prevention System at the Neighborhood Level*, 494 ANNALS 42 (1987).

26. See, e.g., N. ROGERS & C. McEWEN, *supra* note 2, at 204; *DIVORCE MEDIATION: THEORY AND PRACTICE* (J. Folberg & A. Milne eds. 1988).

27. See, e.g., W. DEJONG, G. GOOLKASIAN, & D. MCGILLIS, *THE USE OF MEDIATION AND*

A major challenge for empirical research and for theory, thus, is to understand more fully the simultaneous impulses to distinguish ADR processes and to merge them. We should know, for example, how different kinds of disputes are distributed among predictive and problem-solving ADR. And we should be prepared to find explanations when we establish that the distribution is far from random. In other words, we should be able to explain why some kinds of disputes—of lawyers, and of courts (or administrative agencies)—are far more likely to be engaged with predictive processes and others more likely to be engaged with problem-solving processes.

The most obvious kind of explanation for these sorts of choices and the resultant distribution of cases focuses on the “inherent” qualities of the conflicts and parties. These might include, for example, whether continuing relationships are unlikely or likely, whether the case is “simple” or “complex,” and whether nonparties are affected. Some cases, it is argued, may simply be more suited to problem-solving approaches, while others remain best suited to adversarial processes.²⁹

Menkel-Meadow voices skepticism, however, about the possibility of identifying which cases and parties belong in which kinds of disputing processes.³⁰ As she points out, how parties conceive of any particular dispute evolves over time; disputes are transformed by a variety of forces.³¹ Thus, disputes are not concrete, fixed entities that can be sorted by suitability into different dispute processes. Rather, they are extremely pliable, and among the major forces shaping them are the ways legislators, lawyers, and court personnel define them and fit them into legal categories. That is, disputes may be “different” or “similar” because the law and legal officials treat them differently or similarly.

ARBITRATION IN SMALL CLAIMS DISPUTES (1983); McEwen & Maiman, *Mediation in Small Claims Courts: Consensual Processes and Outcomes*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 53 (K. Kressel & D. Pruitt eds. 1989).

28. See, e.g., Thompson, *Crisis in Rural America: The Genesis of Farmer Lender Mediation*, NIDR FORUM 3 (Fall, 1990); Willardson, *Alternative Dispute Resolution in Farmer-Lender Disputes: Mandatory Mediation in Minnesota*, 5 J. L. & INEQUALITY 487 (1987); *Protecting America's Farmers Under State Mediation Laws and Chapter 12: Who's Being Protected?*, 72 MARQ. L. REV. 466 (1989).

29. See, e.g., S. GOLDBERG, M. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985); Sander, *Varieties of Dispute Processing*, in *NEIGHBORHOOD JUSTICE* 25 (R. Tomasic & M. Feeley eds. 1982).

30. See Sarat, *supra* note 16, at 699. Both Menkel-Meadow and Sarat refer to this as the “allocation” question—which cases belong in which dispute resolution forum—and suggest the difficulty of identifying criteria for allocation.

31. See Felstiner, Sarat & Abel, *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 LAW & SOC'Y REV. 631 (1981); Mather & Yngvesson, *Language, Audience and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1981).

This observation returns us to an examination of the interests, perceptions, and organization of lawyers and of the law as part of an explanation of the distribution of case "types" into predictive and problem-solving ADR. The distribution of case "types" might also, as Menkel-Meadow hints, be related in part to the organization of interests of client groups such as insurance companies.

Clearly, there remains much to be understood about the ADR movement as a whole, and the development and use of both predictive and problem-solving ADR if we are to address the large question of co-optation raised by Menkel-Meadow. We need to think not just about the "ADR movement" but to study the relationship between the "mediation movement" and ADR. We need empirical studies to learn more about the kinds of cases that are directed to problem-solving processes as compared to those directed to predictive ADR. We need to understand the causes of this distribution without assuming that it stems simply from the adversarial training of lawyers or from the inherent qualities of disputes.

Ultimately, however, Menkel-Meadow argues that the co-optation of mediation cannot be fully addressed without looking at the actual character of the day-to-day practices of negotiation and settlement as they are influenced by the introduction of problem-solving mediation.³² So we return to the relationship between mediation and the practice of law.

IV. LEGAL PRACTICE AND PROBLEM-SOLVING SETTLEMENT

What happens to the practice of law when mediation is interposed in the litigation process? Does it transform the way lawyers and clients view problems and seek solutions to them? Or does mediation become co-opted—merely another step in the adversarial struggle to resolve disputes?

More particularly, what do lawyers do when their clients are mediating a case? Do they participate directly and take over the mediation, using it as a forum for making their legal arguments? Or do they encourage their clients to take a lead role in discussions focusing on non-

32. Menkel-Meadow also looks at some of the litigation about ADR for evidence of co-optation. Evidence of litigation about predictive settlement devices tells nothing, of course, about the co-optation of mediation. Even the emergence of a substantial law of mediation may say little about its co-optation. See N. ROGERS & C. McEWEN, *supra* note 2. Much, but not all, of this legalization focuses on the context for mediation, not what happens inside the process. If problem-solving mediation is the resilient and powerful process that its advocates hope it to be, its effectiveness in refocusing adversarial negotiation should remain regardless of the changing and formalizing context in which it takes place. That is why the best evidence about impact must come from studies of what happens in mediation and of how lawyers approach their practices.

legal issues? Do lawyers view mediation as a threat to their practice or as a useful adjunct? Do lawyers perceive mediation as a process that permits new kinds of solutions to complex problems or as one that assists traditional, adversarial negotiations focused on likely court outcomes? Empirical research about such issues can give us a clearer picture of what happens when the adversarial culture and problem-solving settlement meet.

Richard Maiman, Lynn Mather, and I are in the midst of just such a research project, one that examines divorce law practice in Maine and New Hampshire.³³ In this research, we have interviewed at length more than 150 lawyers who practice law in the two states. In Maine, mediation in contested cases involving children has been mandated for several years, while in New Hampshire, public divorce mediation is nonexistent and private mediation is rare. Those interviews tell much about how Maine lawyers have incorporated mediation into their practices, and they will permit comparisons to the practices of New Hampshire lawyers who work without mediation.³⁴ Some preliminary observations from the Maine data follow.

How, generally, do Maine divorce lawyers view mediation and report using it? Lawyers almost always attend mediation sessions and feel free to participate actively in controlling the presentation of the "case" if the "situation" requires it. The lawyers often view a side-benefit of mediation to be its potential to tell them about the strength and character of their adversary's witnesses and evidence. Mediation also serves strategic purposes in helping move the case along, forcing otherwise slow-to-act attorneys on the other side to come to the bargaining table and begin the process of settlement.

Lawyers find mediation particularly useful because it helps to have a third party affirm indirectly the lawyer's advice to a doubting client that his or her position is unreasonable, that it is unlikely to be sustained in court. Thus, mediation serves as a useful forum for advancing the work of predictive settlement. Mediation also may permit the clients to work through issues that the lawyers find unworthy of their legal expertise or too time-consuming to resolve through lawyer-to-

33. This research is supported by grants from the Law and Social Sciences Program and the National Science Foundation, SES-8910625, SES-8910649, and SES-8911653. In addition, my work both on that research and this paper is supported by a Faculty Leave Supplement Grant from the Faculty Research Committee, Bowdoin College.

34. This research also addresses a wide range of questions other than those posed here. For a preliminary report of the findings about how Maine lawyers have incorporated mediation into their practices, see McEwen, Maiman & Mather, *The Impact of Mediation on Divorce Law Practice* (paper presented at the annual meeting of the Law & Society Association, Berkeley, Ca., 1990).

lawyer negotiation. These include the details of visitation arrangements and "pots and pans issues," that is, haggling over division of personal property.

Mediation in this view is a useful adjunct to the normal practice of divorce law.³⁵ It does not alter the lawyer's focus on predictions of what courts might do and on appropriate levels of advocacy on behalf of a client's legal rights. Divorce mediation appears then to have been at least partly co-opted by the adversary culture.³⁶

But this is not the whole story. Many attorneys also see mediation as an important opportunity for parties to control their own settlements. They note the importance of the parties' direct, face-to-face participation in a negotiation process that otherwise can depend on indirect communication through lawyer-to-lawyer negotiations.³⁷ Many lawyers also emphasize the importance of mediation in highlighting nonadversarial values, particularly the values of care of children and of consensual settlement when long-term relationships are likely. Some lawyers concede, too, that this atmosphere at times promotes original solutions to problems, identifies and deals with issues that attorneys had not thought important, and achieves settlement where they thought it impossible.

Thus, despite the easy absorption of mediation into divorce law practice, some things appear to be different as well. At least on occasion, problem-solving settlement occurs in divorce mediation, and lawyers are party to it. As preliminary as these reports are, therefore, they suggest complex answers to the simple question about co-optation. Mediation would appear neither to have been completely co-opted by, nor to have radically transformed, the "adversary culture" of divorce practice in Maine.

35. It is quite clear at this early point in our data analysis that individual divorce lawyers differ substantially in their views about adversarialness in the divorce context. They are almost universal, however, in affirming "what a court would do" as at least one significant frame of reference in approaching a divorce case.

36. In fact, these aspects of co-optation may help explain the relative success and staying power of mandatory mediation in Maine. In addition, lawyers have discovered that mandatory mediation has not produced the awful consequences feared in states where such changes have either been resisted or not proposed. Rather than losing business, attorneys often are concerned that they must bill more hours for divorces because of the time of attendance at mediation sessions. Attorneys in Maine participate in the process rather than being removed from it. As a consequence, attorneys have been among the chief supporters of continued funding of state-sponsored mediation services in the face of threatened funding cutbacks. For some discussion of these issues, see McEwen & Maiman, *Coercion and Consent: A Tale of Two Court Reforms*, 10 LAW & POL'Y 3 (1988).

37. Our evidence appears consistent with other research that reports significant levels of negotiation directly between clients in divorce cases. See Erlanger, Chambliss & Melli, *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585 (1987).

V. CONCLUSION

These complex answers suggest reconsideration of the questions we ask about the relationship between ADR and the adversary culture. The first step in reformulating those questions is to differentiate among ADR processes by distinguishing predictive from problem-solving settlement devices. As we have seen, most ADR techniques spring directly from the adversary culture because they focus on predicting court outcomes as the basis for settlement. Only mediation has the potential to encourage a broader problem-solving approach to settlement, but that potential may be diminished by the tendency to treat all ADR processes as interchangeable.

Having differentiated ADR processes from one another, we can also see more clearly both the significance and the irony of framing the issue as a contest between adversarial/predictive techniques and problem-solving techniques, with the assumption of a winner or loser. As Menkel-Meadow acknowledges, the zeal for advocacy is as legitimate as the zeal for problem-solving settlement. Not everyone shares her view, however, and this disagreement lies at the heart of some of the most heated debates about ADR.

An "either-or" sense of this issue runs through many of the most powerful critiques of ADR, critiques that seem directed in fact largely at the ideology or practice of problem-solving settlement.³⁸ These critiques generally argue that by diminishing the role of advocates and of legal rights and protections, and by focusing on the parties' needs and interests as the basis for resolution, problem-solving settlement threatens to disadvantage and thus to harm weaker parties.

But is the choice between advocacy and problem-solving so stark? Our study of divorce lawyers hints at the capacity of problem-solving processes to integrate rather than to exclude lawyers, and of the ability of lawyers to balance problem-solving with adversarial and rights-oriented approaches. What we may be seeking is a more complex professional role for lawyers, one in which they balance problem-solving and advocacy. We must also extend our understanding of whether and

38. See, e.g., Silbey & Sarat, *supra* note 4 (a critique of ADR that focuses attention on the ideology of problem-solving dispute settlement but seems to identify it with all of ADR). Laura Nader has also identified a "harmony ideology" with ADR generally, even though it seems confined to problem-solving dispute processes. Her critiques of ADR extend far beyond a concern with this ideology, however. See L. NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE (1990); Nader, *The ADR Explosion: The Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. ACCESS TO JUST. (1989); Nader, *The Recurrent Dialectic Between Legality and Its Alternatives: The Limits of Binary Thinking*, 132 U. PA. L. REV. 621 (1984).

how processes like mediation permit and encourage the balancing of these perspectives.

In prompting these questions, beginning the debate, and pointing toward an integrative resolution, Carrie Menkel-Meadow has challenged us to think more clearly about the values and goals of a varied justice system and about the relationships between the institutional reforms of ADR and the day-to-day practices of lawyers who remain central in translating the ideals of change into reality.